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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,

Plaintiff,

vs.

CONACO, LLC; TURNER BROADCASTING SYSTEM; TIME WARNER, INC.; CONAN O' BRIEN; JEFF ROSS; MIKE SWEENEY; and DOES 1-100, Inclusive,

Defendants.

Case No.: 15-CV-01637-JLS-DHB

Hon. Janis L. Sammartino

PLAINTIFF ROBERT ALEXANDER KASEBERG'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGEMENT AS TO DEFENDANTS' AFFIRMATIVE DEFENSES OF FRAUD ON THE COPYRIGHT OFFICE AND UNCLEAN HANDS

DATE: July 26, 2018
TIME: 1:30 p.m.
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I.

INTRODUCTION

Plaintiff brings this motion after Defendants were granted leave to amend their answer to allege additional affirmative defenses and after the Court's comment that Plaintiff may bring a Motion to Dismiss. This Motion arises out of one joke at issue in this case, the Tom Brady Joke. Defendants' affirmative defenses of Fraud on the Copyright Office and Unclean Hands involve the circumstances of the application and subsequent copyright registration for this joke. However, even assuming the allegations in the affirmative defenses are true, Defendants' affirmative defenses must fail as a matter of law. Alternatively, Plaintiff seeks partial summary judgement on the basis that there is no genuine dispute of material fact related to the affirmative defenses. Only one registration application and subsequent certificate is applicable and relevant to this case, that is the September 3, 2015 application/registration certificate for the Tom Brady joke.

The pleadings and additional evidence submitted in this motion will show the following:

1. No inaccurate information was included on the September 3, 2015 single joke **application** which is a requirement for there to be fraud on the copyright office;

2. The August 10, 2016 standard application contains no Tom Brady information and Defendant cannot state a valid defense with regards to that application;

3. There is no genuine dispute as to whether inaccurate information was given to the Copyright Office with knowledge it was inaccurate.

4. Plaintiff is entitled to judgment on the pleadings as to Defendants' affirmative defenses of fraud on the copyright office and unclean hands.

Alternatively, should judgment not be awarded on the pleadings, Plaintiff is entitled to partial summary judgment as to Defendants' affirmative defenses of fraud on the copyright office and unclean hands.

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II.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants allege as the basis for a fraud on the copyright office affirmative defense at ¶65-¶67:

65. Kaseberg, through Lorenzo, engaged in conduct constituting Fraud on the Copyright Office in at least the following ways:

a. Kaseberg failed to disclose to the Copyright Office the July 20, 2016 rejection of the single Tom Brady Joke application with the August 10, 2016 Standard Application;

b. Kaseberg failed to disclose to the Copyright Office the March 23, 2017 second refusal of the September 3, 2015 single application until after Defendants informed Kaseberg's counsel of their intent to assert a Fraud on the Copyright Office affirmative defense because of this material omission; and

c. Kaseberg failed to disclose to the Copyright Office, at any point, the prior publication of the Tom Brady Joke on Twitter before its subsequent publication with two other jokes on Kaseberg's blog claimed on the August 10, 2016 Standard Application; and

d. Kaseberg mischaracterized the holding in the Court's May 12, 2017 summary judgment order in correspondence to the Copyright Office, omitting key facts and details which led the Review Board to issue the registration.

66. Upon information and belief, Defendants allege that Kaseberg had full knowledge of the misrepresentations outlined in paragraphs 65(a)-(d), and yet, despite this knowledge, willfully and deliberately refused to disclose material facts to the Copyright Office so that the Tom Brady applications would be granted registration. Defendants allege that if the Copyright Office were appropriately apprised of this information, both the August 10, 2016 and September 3, 2015 applications would be denied registration.

67. As a result of Kaseberg and/or Lorenzo's fraudulent conduct, both the August 10, 2016 and September 3, 2015 registration are invalid and/or unenforceable, and

Kaseberg is not entitled to any of the remedies afforded by the Copyright Act, including statutory damages or attorneys' fees.

III.

ARGUMENT

A. Legal Standard for Judgment on the Pleadings

A Rule 12(c) motion challenges the sufficiency of the opposing party's pleadings. It provides a vehicle for summary adjudication on the merits, after the pleadings are closed but before trial, which "may save the parties needless and often considerable time and expenses which otherwise would be incurred during discovery and trial." Perez v. Wells Fargo & Co., 75 F. Supp. 3d 1184, 1187 (N.D. Cal. 2014).

Rule 12(c) does not specifically authorize a motion for judgment on the pleadings directed to less than the entire complaint or answer. O'Connell and Stevenson, et al., Federal Civil Procedure Before Trial, California & 9th Circuit Editions, The Rutter Group, §9:340 (2018). Nor does it specifically prohibit such a motion. Id. It is the practice of many judges to permit "partial" judgment on the pleadings (e.g. on the first claim for relief, or the third affirmative defense). Id. citing Independence News, Inc. v. City of Charlotte, 568 F. 3d 148, 154 (4th Cir. 2009); Strigliabotti v. Franklin Resources, Inc., 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005); Curry v. Baca, 497 F. Supp. 2d 1128, 1130 (C.D. Cal. 2007).

On a motion for judgment on the pleadings, the court inquires whether the complaint at issue contains sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The court may find a claim plausible when a plaintiff pleads sufficient facts to allow the Court to draw a reasonable inference of misconduct, but the court is not required to accept as true a legal conclusion couched as a factual allegation. Id. at 678. The complaint should not be dismissed unless it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Cornwell v. Joseph, 7 F. Supp. 2d 1106, 1108 (S.D. Cal. 1998).

The standard applied on a Rule 12(c) motion is essentially the same as that applied on the Rule 12(b)(6) motions; i.e., judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. Fleming v. Pickard, 581 F. 3d 922, 925 (9th Cir. 2009).

B. Legal Standard for Partial Summary Judgment

Pursuant to Fed. R. Civ. P. 56(a), A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Where the historical facts controlling the application of a rule of law are undisputed, the application raises a question of law for the court and summary judgment is appropriate in such cases. Delbon Radiology v. Turlock Diagnostic Ctr., 839 F. Supp. 1388, 1391 (E.D. Cal. 1993). "Material" facts are those that, under applicable substantive law, may affect the outcome of the case: "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment . . . (I)t is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986). In addition, a factual dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

C. Plaintiff is Entitled to Judgment on the Pleadings as to the Fraud on the Copyright Office Affirmative Defense

1. Legal Standard for Fraud on the Copyright Office

The fraud on the copyright office defense arises from 17 U.S.C. § 411 (b), which states, "A certificate of registration satisfies the requirements of this section and section 412 regardless of whether the certificate contains any inaccurate information, unless –

(A) the inaccurate information **was included on the application for copyright registration with knowledge that it was inaccurate**; (emphasis added) and (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration."

The Ninth Circuit has specifically held that "inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement." Urantia Foundation v. Maaherra, 114 F. 3d 955, 963 (9th Cir. 1997).

The leading authorities in the Ninth Circuit have all confirmed that fraud on the copyright offices arises from 17 U.S.C. 411 (b) and have dealt with inaccuracies on the registration application or subsequent registration certificate. See Jules Jordan Video, Inc. v. 144942 Canada, Inc., 617 F. 3d 1146, 1156 (9th Cir. 2010) (Mistake in listing claimant as the author on the copyright registration forms when work for hire issue arises); Lamps Plus, Inc. v. Seattle Lighting Fixture, Co., 345 F. 3d 1140, 1144-1145 (9th Cir. 2003) (Mistake on copyright application for Victorian Tiffany table lamp when applicant failed to identify the designers or the source of any of the preexisting works incorporated into the lamp); Urantia Foundation, supra, 114 F. 3d 955 at 960. (copyright renewal certificate incorrectly stated that applicant was claiming renewal as the "proprietor of copyright in a work made for hire.") Plaintiff has been unable to locate any authority supporting Defendants claim that there can be fraud on the copyright office related to argument made in a reconsideration/appeal related to a valid copyright application that contains no inaccuracies or indicia of fraud. Since there Defendants have not and cannot allege anything incorrect or inaccurate on the face of Plaintiff's copyright applications their defense must fail as a matter of law.

2. September 3, 2015 Application/Registration

Here, Defendants' affirmative defense, spanning from paragraphs 45 – 68, grasps at straws and mentions nothing regarding the information included on Plaintiff's actual

copyright application. That is because Defendants know there are no facts that can be alleged in Defendants' answer that there was any incorrect information included in Plaintiff's copyright application and/or subsequent registration with respect to the September 3, 2015 application. As such, Defendants' affirmative defense of fraud on the copyright office must fail as a matter of law with respect to this application.

a. A Reconsideration Letter is not Information Included on the Application for Registration

To the extent that Defendants' amended answer includes allegations that Plaintiff committed fraud on the copyright office by means of misrepresenting the Court's Order, Defendants' defense also fails as a matter of law.

As outlined above, Paragraphs 60 and 65d of Defendants' Amended Answer alleges that in the May 30, 2017 letter to the Copyright Office, Kaseberg's attorney mischaracterized the content of the Court's summary judgment order. However, these communications with the Copyright Office had nothing to do with the "information…included on the application for copyright registration." See 17 U.S.C. §411(b). The only information that is looked at in determining the merits of a fraud on the copyright office defense is what was actually submitted on the copyright application. Urantia Foundation, supra, 114 F. 3d at 963. There is no allegation in Defendants' answer that Plaintiff committed fraud in the application itself. Plaintiff's reconsideration letter, attaching the Order Denying Defendants' Motion for Summary Judgment, is not information that was included on the application for copyright registration. That information is argument in an appeal related to originality and as to why a copyright application should be registered. The form submitted to the Copyright Office "Form TX" includes nine (9) different blank spaces that need to be filled in when applying for a copyright registration: 1. Title 2. Author 3. Creation and Publication 4. Claimant(s) 5. Previous Registration 6. Derivative Work or Compilation, 7. Deposit Account, Correspondence, Fee 8. Certification and 9. Return Address. (See Plaintiff's Separate Statement of Material Facts "UF" 1). A true and correct copy of the "Form TX"

obtained from the United States Copyright Office website as attached to the Request for Judicial Notice (RFJN) as **Exhibit A** and Declaration of Jayson M. Lorenzo as **Exhibit 1**.

A reconsideration letter does not fit into any of the nine (9) categories listed on the Form TX. Therefore, Defendants' allegations of fraud on the copyright office with respect to the reconsideration letter therefore must fail as a matter of law.

b. Defendants Fail to and Cannot Plead that any "Inaccurate Information" was Given to the Copyright Office

Even if this Court were to entertain the argument that documents attached to a reconsideration letter can be considered for purposes of a fraud on the copyright office affirmative defense , Defendants' Answer omits the fact that Plaintiff attached the Order denying Defendants' Motion for Summary Judgment to the reconsideration letter which is undisputed. (UF 2) (See Declaration of Jayson M. Lorenzo, "Lorenzo Decl." at ¶ 3, **Exh. 2**). Defendants' entire fraud claim relates to the September 3, 2015 application and the alleged misrepresentation of words "ruled" as opposed to "dicta". (ECF No. 165 at ¶ 60)

As with Rule 12(b)(6) motions, if matters outside the pleading are presented to and not excluded by the court, the motion for judgment on the pleadings can be converted into a Rule 56 summary judgment motion. Fed. R. Civ. P. 12(d). However, the court may consider the full text of documents referred to in the complaint without converting the motion to a motion for summary judgment, provided that the document is central to the plaintiff's claim and no party questions the authenticity of the document. Branch v. Tunnell, 14 F. 3d 449, 454 (9th Cir. 1994).

Here, Defendants' amended answer specifically references Plaintiff's reconsideration letter of May 30, 2017, is central to Defendants' affirmative defense, and there is no dispute to the authenticity of the document, thus the Court can consider the letter for purposes of a motion for judgment on the pleadings. Alternatively, the letter can be considered as part of Plaintiff's alternative request for Partial Summary

Judgment. When this Court considers the letter adding these omitted facts to Defendants' affirmative defense the defense fails as a matter of law for the following additional reasons.

c. No Genuine Issue of Intent to Defraud

There is no genuine dispute that Plaintiff did not intend to defraud which is a required element of fraud on the Copyright Office. S.O.S, Inc. v. Payday, 886 F. 2d 1081 (9th Cir. 1989). Defendants referenced Plaintiff's letter to the Copyright Office of May 30, 2017. ECF No. 165 at ¶ 60. There is no dispute that Plaintiff gave the Copyright Office the entire Order and even cited the lines and page numbers where the Copyright Office should look in the order. (UF 2) (Decl. of Lorenzo at ¶ 3**, Exh. 2**) Suggesting that Plaintiff made a "material misstatement intended to defraud the Copyright Office into granting a registration" is disingenuous. How can Plaintiff have intended to defraud the Copyright Office of what the Court ruled or wrote when the Copyright Office was given the Order with specific lines and page numbers to review and to read for themselves? Additionally, the summary judgment moving papers, opposition, and reply briefs are all public records accessible to anyone including the Copyright Office. If the Copyright Office had any concerns when reading the entire order, the Copyright Office could access the briefs.

d. Copyrightability of the Jokes at Issue was Briefed and Argued at Summary Judgment

Defendants contend Plaintiff misrepresented the ruling of this Court, specifically that Plaintiff's statement of "ruled" was an intentional misrepresentation of dicta. However, Plaintiff cannot intentionally misrepresent something that it believes to be true. First, this Court would not have written or written "[i]n the present case, there is little doubt that the jokes at issue merit copyright protection" if it was not an issue in the motion. In fact, Defendants argued the following in their summary judgement motion:

1. Kaseberg's setups are derived entirely from current events and news stories, and it is axiomatic that current events and news stories are not copyrightable. (ECF No. 70, 14:11-13)

2. Unlike many other types of jokes, Kaseberg's jokes rely exclusively on ideas, not expression, to derive the desired humor. Thus, Kaseberg's punchlines are inherently composed of unprotectable elements. (ECF No. 70, 14:24-26)

3. Even assuming that some expressive elements remain after filtering out the underlying ideas from Kaseberg's punchlines, those expressive elements still barely qualify for copyright protection, if at all. (ECF No. 70, 15:5-7)

Plaintiff argued in his opposition:

4. Sorting through all of Defendants citations and purported analysis, Defendants' argument is simple. They conveniently argue the jokes should be dissected so no protection is found. Since the premise of each joke is based on a current event or fact there should be no copyright protection to the first portion of the joke. They then go on to argue that the punchlines "rely exclusively on idea" and is not an expression, thus the punchlines are unprotectable elements. They continue by arguing that if the Court finds the punchlines are expressive elements, the punchlines are "ordinary phrases" that are not entitled to copyright protection either. Essentially Defendants argue there should be no copyright protections whatsoever in these types of jokes because neither the premise or punchline is protectable through dissection. (ECF No. 97, Opposition to Motion for Summary Judgment, 17:25 - 18:6)

5. Kaseberg's Works Must be Viewed as Whole, are Fiction and are Entitled to Protection. Kaseberg is not claiming copyright over the setup or facts/news events that start the joke. Nor is he claiming copyright on the punchline by itself. The Jokes Kaseberg created have no meaning without the other. What he is claiming copyright on is his idea that has been expressed in a written medium which was to select and write certain news events and combine that news event with a fictional, creative, unique and humorous take. The fact is, the punchlines are all pure fiction and when combined with

the premise, none of what Kaseberg wrote actually took place, which is an entirely new work. (ECF No. 97, Opposition to Motion for Summary Judgment,18:17-25)

6. Kaseberg's position that the combination of ideas that are expressed are protectable is well established in the 9th Circuit. See Metcalf v. Bochco, 294 F.3d 1069 (9th Cir. 2002). The Metcalf court held that the combination of unprotectable elements are entitled to protection and meet the extrinsic test. Id. at 1074. The plaintiff in Metcalf correctly argued that copyright law protects a writer's expression of ideas, but not the ideas themselves. Id. at 1074 (citing Kouf, 16 F.3d at 1045). "General plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind." Id. (citing Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir.1985)). Nor does copyright law protect "scenes a faire," or scenes that flow naturally from unprotectable basic plot premises. Id. (citing See v. Durang, 711 F.2d 141, 143 (9th Cir.1983)). Instead, protectable expression includes the specific details of an author's rendering of ideas, or "the actual concrete elements that make up the total sequence of events and the relationships between the major characters." Id. (citing Berkic, 761 F.2d at 1293.) (ECF No. 97, Opposition to Motion for Summary Judgment, 19:4-16)

Oral argument recorded:

4. BECAUSE MOST JOKES ARE SO DEPENDENT ON THE IDEA INVOLVED, OUR POSITION WOULD BE THAT **MOST JOKES ARE NOT COPYRIGHTABLE**, AND IF THEY ARE, ONLY TO THE EXTENT, ONLY TO THE VERY SPECIFIC EXPRESSION THAT THEY USE. (Reporter's Transcript, Argument by Rex Hwang at 24:12-15) (emphasis added)

5. THE COURT: -- AND COUNSEL THINKS, HE'S COMMENTED ON THAT. WHY DON'T YOU COMMENT ON WHAT YOU THINK WOULD BE PROTECTABLE UNDER THIN PROTECTION, IF IT'S PROTECTABLE AT ALL? (Reporter's Transcript, Question by Court to Rex Hwang at 24:23-25)

Defendants' argument at summary judgment was that neither the premise/setup or punchline was protectable, the logical conclusion of which results in no protection at all.

The entire issue of whether a two-line joke is entitled to copyright protection and is original has been central to Defendants' position. The argument was made by Defendant, Plaintiff briefed a response and this Court appropriately found:

> In the present case, there is little doubt that the jokes at issue merit copyright protection. See, e.g., Feist, 499 U.S. at 345 (noting originality requires only independent creation of a work that "possess[es] some creative spark, 'no matter how crude, humble or obvious' it might be" (quoting 1 Nimmer § 1.08[C][1])); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [creative works], outside of the narrowest and most obvious limits."). (ECF No. 131, 7-13).

The issue of copyrightability was clearly briefed. Defendants' defense must fail as a matter of law because Defendants' Answer on its face cannot state a valid defense when the Court considers the briefing by judicial notice or alternatively there is no genuine dispute that Plaintiff with knowledge, willfully and intentionally mischaracterized the ruling of the Court because the issue of copyrightability was argued and briefed.

e. Any Alleged Inaccurate Information Would not have caused the Copyright Office to Refuse Registration

Defendants allege that had the Copyright Office known all of the information it would have denied registrations for the September 3, 2015 and August 10, 2016. Even assuming that Plaintiff had not represented that this Court had ruled " there is little doubt that the jokes at issue merit copyright" it would not have had any effect on the Copyright Office's decision. It is undisputed that in the letter granting registration for the September 3, 2015 Tom Brady application, the Board writes,

"The Board bases its finding on the "minimal degree of creativity" required by the U.S. Supreme Court in Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). As a textual work, the Work meets the threshold for copyright protection as

articulated in Feist. Courts and the Copyright Office both have found copyright protection as articulated in Feist. Courts and the Copyright Offices both have found copyright protection for jokes when the jokes are sufficiently creative. See e.g., Foxworthy v. Custom Tees, Inc., 879 F. Supp. 1200, 1219 (N.D. Ga. 1995)." (UF 3) A true and correct copy of the Review Board's decision is attached to the Request for Judicial Notice as **Exhibit B.** Again, Defendants have referenced this document in their Amended Answer. ECF No. 165 at ¶ 63.

The Board then goes on to write, "The Board notes its decision is consistent with a decision in the Southern District of California, finding that this Work merits thin copyright protection." (UF 3) (Request for Judicial Notice, **Exh. B**). The letter speaks for itself and clearly the Board read and understood the entire Order noting "thin protection" which was not referenced in Plaintiff's reconsideration letter of May 30, 2017. The Board's decision indicates that it was made independently of the Court's decision based on Feist and Foxworthy. Indeed, the Review Board was careful to "note" that its "decision is consistent" with the Motion for Summary Judgment Order in this case. Nowhere do they state they are "relying on" or "following" or the Court's decision. Again, Defendants' defense must fail as a matter of law because Defendants Answer on its face cannot state a valid defense or alternatively there is no genuine dispute that the Copyright Office had relied on inaccurate information that would have caused the Copyright Office to refuse registration because the Board cited that the Southern District of California found "thin protection."

3. The August 10, 2016 Application/Registration Contains no Tom Brady Information and is Therefore Irrelevant and there is no Relief Available

The result of a finding of fraud on the Copyright Office is an invalidation of the registration. L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 853; Nimmer & Nimmer, at § 7.20[B]. Indeed, Defendants' First Amended Answer alleges in paragraph 67 that the August 10, 2016 registration is invalid and/or unenforceable. However, Defendants have known for some time that the August 10, 2016, registration

no longer contains any Tom Brady information. There is nothing to enforce against Plaintiff that is relevant to this case. Thus, they are attempting to invalidate and/or render unenforceable a registration that has nothing to do with this case. As such Defendant cannot state a claim for relief against Plaintiff related to the August 10, 2016 application/registration which must fail as a matter of law.

Indeed, the public catalog on the Copyright Office website for registration TX0008351767 (August 10 application) now notes that pre-existing material of "Text of joke registered under TX0008402730" has been excluded. (UF 4) (Lorenzo Decl. at 5, **Exh. 4**). (Request for Judicial Notice, **Exhibit C**). A true and correct copy of the public catalog for registration TX0008402730 (September 3 application) is attached to the Request for Judicial Notice as **Exhibit D**, (Lorenzo Decl. at 6, **Exh. 5**). As discussed above, this additional evidence referred to in Defendants' Answer and central to Defendants' Answer may be considered by the Court without converting the motion to judgment on the pleadings to a motion for summary judgment.

Further, any allegation of intent to defraud related to this application has no merit. There is no dispute that Plaintiff's counsel spoke to Ted Hirakawa of the Copyright Office in August 2015, wherein he was advised a single application and collective work application could be submitted for the same joke. (UF 5) (Lorenzo Decl. at ¶ 7) (ECF No. 132, Declaration of Jayson M. Lorenzo at ¶ 23 filed on June 28, 2017). Plaintiff had already received single joke registrations for the Washington Monument and Bruce Jenner jokes, but for the Tom Brady joke, a single application was refused. To Plaintiff this seemed very inconsistent. Additionally, a collective work registration was also issued for the Bruce Jenner jokes published on the same date and time. Therefore, there was a single and collective work registrations for Bruce Jenner. Plaintiff questioned that if the Tom Brady was not entitled to a registration as a single joke, would a collection of three jokes be entitled to protection as there were three written at the time instead of one. (ECF No. 132, Declaration of Jayson M. Lorenzo at ¶ 24 filed on June 28, 2017).

Plaintiff's actions were consistent with what was learned from Mr. Hirakawa and what had already transpired with the Bruce Jenner Joke.

Defendant alleges "Kaseberg and Lorenzo only made remedial efforts when faced with negative repercussions for their underhanded conduct after Defendants notified Lorenzo that he and Kaseberg had committed fraud on the Copyright Office." However, there is no dispute that on April 21, 2017, prior to any allegations of fraud on the copyright office and prior to any registration certificate being issued for the August 10, 2016, application Plaintiff sent a letter to the copyright office advising the Copyright Office of the pending lawsuit, the application history of the Tom Brady joke, as well as the collective work application filed on August 10, 2016. (UF 6) (Lorenzo Decl. at ¶ 8, **Exh. 6**) (ECF No. 132, Declaration of Jayson M. Lorenzo at ¶ 23 at Exh. O filed on June 28, 2017, RJN). Irrespective of this information, Defendant cannot as a matter of law seek invalidation or render unenforceable a copyright registration that does not contain the Tom Brady information because it simply has no relevance to this case.

D. Unclean Hands Affirmative Defense

As quoted in Nimmer on Copyright,

"Apart from the issue of antitrust violation… the courts on occasion invoke the equitable doctrine of unclean hands as a defense in a copyright infringement action. This equitable defense has been held available in a copyright infringement action regardless of whether the action is one at law or in equity. However, such a defense is recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action. For instance, the defense has been recognized when the plaintiff misused the process of the courts by falsifying a court order, by falsifying evidence, or by misrepresenting the scope of his copyright to the court and opposing party." Nimmer. Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.09 [B] (Matthew Bender Rev. Ed.)

Much of Defendants' Unclean Hands allegations are exactly the same as those asserted in the Fraud on the Copyright Office Defense (See Paragraphs 70-72 of Amended

Answer). The rest of the allegations involve allegedly withholding documents for which Defendants have suffered no harm. (See Paragraphs 73-75).

1. Defendant has Received all Documents

Plaintiff produced all information after the Summary Judgment Order. Notwithstanding this production, Defendants' nonetheless claim that they were prejudiced as a result of not being able to review the rejections that Plaintiff received with respect to the Tom Brady Applications. This Court ruled at Summary Judgement that Defendant would be permitted to reopen discovery and bring another dispositive motion on the issue of fraud on the copyright office. Any alleged inequitable conduct has been addressed. Currently, there is no August 10, 2016, that has anything to do with the instant case. The only issue is whether there is any unclean hands allegations that can be made as it relates to the September 3, 2015 application.

The unclean hands argument as it relates to the September 3, 2015, must also fail because as alleged it flows entirely from a fraud on the copyright office claim that fails as a matter of law as set forth above.

Therefore, Defendants' allegations of Unclean Hands fail as a matter of law because 1) any procedural issues were addressed by this Court in the Summary Judgment Order and 2) the unclean hand allegations flow from fraud on the copyright office allegation that fails as a matter of law.

IV.
CONCLUSION

To conclude, Defendants' affirmative defenses of fraud on the copyright office and unclean hands must fail as a matter of law either by way of Motion for Judgment on the Pleadings or alternatively by way of Partial Summary Judgment. The September 3, 2015 application included no inaccurate information. Instead, Defendants claim a reconsideration letter which attached a copy of this Court's summary judgment ruling forms the basis of a fraud on the copyright office defense as to the 2015 application. This information was not part of the application, was not inaccurate information, there can be

no intent to defraud the copyright office when the ordered was produced and was not relied upon by the Copyright Office as stated in their own letter. As for the August 10, 2016 application, there is no relief that can be granted to Defendants because the current registration for that application does not include a Tom Brady Joke and there is no harm or remedy available to Defendants with respect to that application. As for the unclean hands defense, as it is based almost entirely on Defendants' fraud on the copyright office defense, which fails as a matter of law, it too must fail.

Respectfully submitted,

Date: May 9, 2018 By:____/s/ Jayson M. Lorenzo_____
JAYSON M. LORENZO
Attorney for Plaintiff
ROBERT ALEXANDER KASEBERG